161

No. 09-1199

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SYLVIA BAPTE, et al.,

Petitioners,

—v.—

WEST CARIBBEAN AIRWAYS, NEWVAC CORPORATION, GO 2 GALAXY, INC., JACQUES CIMETIER, and ASEGURADORA COLSEGUROS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Plaintiffs in the Courts Below

Plaintiffs filed three separate actions on behalf of the 152 passengers-decedents.

a. Sylvia Bapte v. Newvac Corporation (The Bapte Plaintiffs): A list of the plaintiffs in *Bapte* is set forth in the Appendix to the Petition for Writ of Certiorari at App. 111-120.

b. Henri Galbert v. West Caribbean Airways (The Galbert Plaintiffs): The following is a list of the plaintiffs and claimants in *Galbert* as set forth by plaintiffs in the Courts below:

1. Arcade, Laura Mylene
2. Bapte, Jean-Marc
3. Bapte, Jean-Michel
4. Berisson, Nadine
5. Berisson, Patricia
6. Bermont, Christophe
7. Bermont, Johanne
8. Bermont, Sabrina
9. Bermont, Yvette
10. Borot-Lapoulia, Marie-Claude
11. Cabrera, Odile
12. Cadignan-Victorin, Gabrielle
13. Cage, Vincent Jose
14. Clerence, Manuel
15. Couffe, Adrienne
16. Couffe, Didier-David
17. Couffe, Jenny Jacqueline
18. Couffe, Josette Madeleine
19. Couffe, Raymonde
20. Couffe, Rolland Roger
21. Destinval, Joel

22. Dijon, Gerard
23. Dijon, Jean-Robert
24. Dijon, Loic
25. Dijon, Mary-Line
26. Dijon, Maurice
27. Dijon, Nicolette
28. Dijon, Paule
29. Egesipe, Karine
30. Emal, Marie-Louise
31. Eudaric, Astrid
32. Eudaric, Hervey
33. Eudaric, Jean-Claude
34. Fostan, Felix
35. Galbert, Daniel
36. Galbert, Henri
37. Gombe, Alix
38. Gombe, Desiree Marie-Gregorie
39. Gombe, Manuela Edmee
40. Grabin, Franck
41. Grabin, Kevin
42. Hayot, Christophe
43. Hospice, Daniel
44. Hospice, Eric
45. Hospice, Sarah
46. Iphaine, Doris
47. Iphaine, Jean-Marc
48. Iphaine, Maguy Marlene
49. Iphaine, Marie-Claire
50. Iphaine, Serge
51. Iphaine, Simone
52. Jeremie, Joelle
53. Jeremie, Tony
54. Joachim-Arnaud, Simone
55. Joseph-Auguste, Irlene
56. Joseph-Boniface, Celine
57. Jougan, Phillipe Gislaine

58. Jougon, Saint-Cyr Athanase
59. Landes, Alex Elisabeth
60. Landes, Andre Vincent
61. Landes, Jean Claude Joseph
62. Landes, Marcel Saturnin
63. Landes, Rose Eliane Florian
64. Landes, Serge Reine
65. Landes-Berton, Ines
66. Lanior, Jenny
67. Lanoir, Gilbert
68. Lanoir, Lenny
69. Lanoir, Marvin
70. Lanoir, Rene
71. Laurent-Cyrille, Marie-Eugenie Bernadette
72. Legendart, Johan
73. Legendart, Lucette
74. Louisor, Jeanne Porro
75. Magloire, Djera
76. Magloire, Sylvie
77. Magloire, Tadjana
78. Magloire, Yendra
79. Maquiaba, Victor
80. Marie-Claire, Emma
81. Marie-Claire, Henri Bleral
82. Marie-Claire, Monette
83. Marie-Luce, Ketty Emmanuelle
84. Marie-Luce, Marie-Jeanne
85. Martial, Malika Mylene Vincent
86. Mitrail, Michelle Theodore
87. Montlouis-Felicite, Daniel
88. Montlouis-Felicite, David
89. Montlouis-Felicite, Guy
90. Montlouis-Felicite, Huguette
91. Montrop, Amandine
92. Nal, Henri
93. Nal, Luce

94. Nal, Marcel Jean-Pierre
95. Nal, Mariette
96. Nicolas, Charpentier Marcel
97. Novy, Suzette
98. Olivarius, Harry
99. Peters, Florent Joseph Gerard
100. Peters, Jany Josephe Therese
101. Peters, Monique Josephe Gerard
102. Peters, Suzelle Joseph Eliette
103. Peters, Yvelise
104. Procolam, Joel
105. Procolam, Madeleine
106. Pronzola, Laure
107. Ramin, Jean-Marc
108. Ramin, Murielle
109. Ramin, Olivier
110. Ramin, Regine
111. Raphose, David
112. Rosamond, Dorianne
113. Rosamond, Florent Joseph
114. Rosamond, Franck
115. Rosamond. Jean Lambert
116. Rosamond, Rita Rosamond, Robert
117. Rosamond, Rodolphe
118. Rosamond, Ulric
119. Sainte-Rose, Georges-Henri Jean
120. Sainte-Rose, Nathalie Raoul
121. Sainte-Rose, Roger Hubert
122. Seneron, Marie-Therese
123. Sinosa, Manuela Louise Louis-Marie
124. Strykala, Jocelyne
125. Tisserand, Andre Joseph
126. Venkatapen, Danielle
127. Venkatapen, Eliane
128. Venkatapen, Georges
129. Venkatapen, Jeanne

130. Venkatapen, Raymonde
131. Venkatapen, Rene
132. Venkatapen, Rose-Marie
133. Viardot, Rudy
134. Viardot, Valerie
135. Violton, Fred
136. Violton, Omemicia
137. Violton, Roberto
138. Violton, Valerie

c. Marie-Pierre Cadare v. Newvac Corporation (The Cadare Plaintiffs): The following is a list of the plaintiffs in *Cadare* as set forth by plaintiffs in the Courts below:

1. Cadare, Marie-Pierre, through her Personal Representative
2. Couffe, Raphaelle, through his Personal Representative
3. Berton, Francis, through his Personal Representative
4. Felicite, Marie-Odile Monlouis, through her Personal Representative
5. Scaglioni, David, through his Personal Representative

Defendants in the Courts Below

Defendants in the District Court and Court of Appeals below were as follows:

1. West Caribbean Airways, S.A., a Colombian air carrier which operated the chartered aircraft involved in this litigation.
2. Newvac Corporation and Go 2 Galaxy, Inc., are both small tour operators located in Florida.

3. Jacques Cimetier is a private individual who is the President of Newvac Corporation and Go 2 Galaxy, Inc.

Amici in the Courts Below

The United States of America appeared as *Amicus Curiae* and filed briefs in both the District Court and Court of Appeals in support of the position of Respondents regarding the availability of *forum non conveniens* in an action governed by the Montreal Convention.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUP. CT. RULE 29.6

Respondents Newvac Corporation and Go 2 Galaxy, Inc. are corporations organized and existing under the laws of Florida with their principal place of business in Florida. There is no parent corporation or publicly held corporation owning 10% or more of the stock of Newvac Corporation or Go 2 Galaxy, Inc.

Respondent West Caribbean Airways, S.A., is a Colombian air carrier organized and existing under the laws of Colombia and currently is in bankruptcy. There is no parent corporation or publicly held corporation owning 10% or more of the stock of West Caribbean Airways, S.A.

TABLE OF CONTENTS

	PAGE
PARTIES TO THE PROCEEDINGS	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUP. CT. RULE 29.6 .	vii
TABLE OF AUTHORITIES.....	x
TREATY PROVISION INVOLVED	1
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
STATEMENT OF THE CASE	2
A. Relevant Facts.....	3
B. Relevant Proceedings in the Courts Below	4
The District Court Decisions	4
Petitioners' Rule 60(B) Motion	7
The Court of Appeals *Forum Non Conveniens* Decision	9
REASONS FOR DENYING THE WRIT.....	11

PAGE

I. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE MONTREAL CONVENTION ALLOWS U.S. COURTS TO CONTINUE TO USE THE PROCEDURAL DOCTRINE OF *FORUM NON CONVENIENS* 11

II. THE COURT OF APPEALS DECISION FINDING THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING *FORUM NON CONVENIENS* DISMISSAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT 20

CONCLUSION..... 24

APPENDIX

Bapte v. West Caribbean Airways, 2010 WL 1141063 (11th Cir. Mar. 25, 2010). 1a

In re West Caribbean Airways, S.A., No. 06-22748, Slip Op. (S.D. Fla. Sept. 11, 2009) 5a

Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force Nov. 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734 ("Montreal Convention")..... 12a

TABLE OF AUTHORITIES

Cases: PAGE

The Amiable Isabella, 19 U.S. 1 (1821)..... 17n

Bapte v. West Caribbean Airways, 2010 WL 1141063 (11th Cir. Mar. 25, 2010) (Opp. App. at 1a-4a) 9

Brinkerhoff Maritime Corp. v. P.T. Airfast Servs. Indonesia, [1992] 2 S.L.R. 776, Lexsee 2 SLR 776 (Sing. C.A.) 13n

Chan v. Korean Air Lines, 490 U.S. 122 (1989) 17n

Chukwu v. Air France, 218 F. Supp. 2d 979 (N.D. Ill. 2002) 13n

Eastern Airlines, Inc. v. Floyd, 499 U.S. 530 (1991) 12n

El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999).....12n, 17n

Esheva v, Siberia Airlines, 499 F. Supp. 2d 493 (S.D.N.Y. 2007)..... 23n

Greene v. Beard, 523 U.S. 371 (1998)..... 15

Hosaka v. United Airlines, 305 F. 3d 989 (9th Cir. 2002), *cert. denied*, 537 U.S. 1227 (2003).....*passim*

PAGE

In re West Caribbean Airways, S.A., No. 06-22748, Slip Op. (S.D. Fla. Sept. 11, 2009) (Opp. App. at 5a-11a), *aff'd as amended sub nom. Bapte v. West Caribbean Airways*, 2010 WL 1141063 (11th Cir. Mar. 25, 2010) (Opp. App. at 1a-4a) 4n, 7-9

In re West Caribbean Airways, S.A., 619 F. Supp. 2d 1299 (S.D. Fla. Sept. 27, 2007) ("*WCA I*") (Pet. App. at App. 21-87) ..... *passim*

In re West Caribbean Airways, S.A., No. 06-22748, Slip Op. (S.D. Fla. Nov. 9, 2007) ("*WCA II*") (Pet. App. at App. 88-108)..... *passim*

In re West Caribbean Crew Members, 632 F. Supp. 2d 1193 (S.D. Fla. May 14, 2009) 7

In re Air Crash Disaster Near New Orleans, La., on July 9, 1982, 821 F. 2d 1147 (5th Cir. 1987) *(en banc), vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *vacated in part and aff'd in part on remand*, 883 F.2d 17 (5th Cir. 1989) . 13n

In re Air Crash Off Long Island, N.Y., on July 17, 1996, 65 F. Supp. 2d 207 (S.D.N.Y. 1999)..... 13n

PAGE

Jennings v. Boeing Co., 660 F. Supp. 796 (E.D. Pa. 1987) 23n

Leon v. Millon Air, Inc., 251 F.3d 1305 (11th Cir. 2001) 23n

Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604 (3d Cir. 1991) 23n

Lu v. Air China Int'l Corp., 1992 WL 453646 (E.D.N.Y. 1992)..... 13n

Milor v. British Airways, Plc., [1996] Q.B. 702 (Eng. C.A.) 14n

Pierre-Louis v. Newvac Corp., 584 F.3d 1052 (11th Cir. Oct. 8, 2009) ("*Pierre-Louis*") (Pet. App. at App 1-10) .....*passim*

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).....20, 21, 23

Sinochem International Co. Ltd. v. Malaysia International Shipping Corp., 549 U.S. 422 (2007).....20, 21, 23

Sumitomo Shoji America v. Avagliano, 457 U.S. 176 (1982) 17n

PAGE

Treaties and Rules:

Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force November 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734 ("Montreal Convention") (Opp. App. at 12a-49a) ..... *passim*

Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* note following 49 U.S.C. § 40105 ..... 11, 13, 14, 19

Fed. R. Civ. P. 60(b) 7

Other Authorities:

S. Exec. Rep. 108-08 (2003) 15

Brief of the United States as Amicus Curiae In Support of Defendants-Appellees, No. 07-15828 (11th Cir. filed May 15, 2008) 17-19

Joint Status Report, No. 06-22748, Doc. No. 155 (S.D. Fla. entered Aug. 31, 2007) 21n, 22

PAGE

Plaintiffs' Oppositions to [Newvac] Motion to Dismiss on Grounds of Forum Non Conveniens, No. 06-22748, Doc. No. 170 (S.D. Fla. filed Oct. 19, 2007) 22

TREATY PROVISION INVOLVED

The applicable treaty is the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force Nov. 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734 ("Montreal Convention") and is reproduced in the Appendix ("Opp. App.") hereto at 12a-49a.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Newvac Corporation, Go 2 Galaxy, Inc. and Jacques Cimetier (hereinafter referred to collectively as "Newvac") and West Caribbean Airways, S.A. ("WCA") respectfully request that the Court deny the Petition for Writ of *Certiorari* ("Petition") seeking review of the opinion of the Court of Appeals for the Eleventh Circuit in this case which is officially reported at *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. Oct. 8, 2009) ("*Pierre-Louis*") and reproduced in the Appendix to the Petition ("Pet. App.") at App. 1-10. The decision of the District Court (1) with respect to the Montreal Convention is officially reported at *In re West Caribbean Airways, S.A.*, 619 F. Supp. 2d 1299 (S.D. Fla. Sept. 27, 2007) ("*WCA I*") and reproduced in the Pet. App. at App. 21-87, and (2) granting dismissal of the *forum non conveniens* motion, *In re West Caribbean Airways, S.A.*, No. 06-22748, Slip Op. (S.D. Fla. Nov. 9, 2007) ("*WCA II*"), is not officially reported and is reproduced in the Pet. App. at App. 88-108.

STATEMENT OF THE CASE

This litigation arises from the August 16, 2005 crash in Venezuela of WCA Flight 708 while en route from Panama to Martinique. All of the 152 passengers and 8 crew members on board the aircraft perished in the accident. The passengers-decedents were residents of Martinique, a Department of France, and mainly citizens of France; none were citizens or residents of the United States.

Representatives of the 152 passengers-decedents involving over 665 Martinique beneficiaries filed three separate actions in the United States District Court for the Southern District of Florida against (1) WCA, a Colombian air carrier operating the chartered aircraft which conducted no business in the United States, (2) Newvac Corporation and Go 2 Galaxy, Inc., small tour operators based in Florida, and (3) Jacques Cimetier, the President of Newvac and Go 2 Galaxy, Inc.[1] These three actions filed by the *Bapte* Plaintiffs, the *Galbert* Plaintiffs and the *Cadare* Plaintiffs (collectively referred to herein as "Plaintiffs") were consolidated before the District Court below. Plaintiffs in each action sought to recover damages for the deaths of 152 the passengers-decedents pursuant to the terms of the Montreal

[1] Plaintiffs also sued WCA's insurer, Aseguradora Colseguros, S.A. (a Colombian corporation), Globe-Trotter de Riviere Salee Travel ("Globe-Trotter"), the Martinique travel agent which marketed the one-week trip from Martinique to Panama, MK Leasing (USA) (a Nevada corporation), and MK Capital, Inc, (a Nevada corporation). Aseguradora Colseguros never was served and was dismissed. The MK defendants and Globe Trotter and its owners were also dismissed from these actions.

Convention, which exclusively governs the rights and liabilities of passengers and carriers for passenger death occurring during the course of international carriage by air.

Petitioners herein are representatives of *Bapte* Plaintiffs who consist of 102 of the 152 passengers-decedents. The *Cadare* Plaintiffs settled their claims while the appeal was pending before the Eleventh Circuit and the *Galbert* Plaintiffs do not seek this Court to review the decisions of the Courts below.

The United States also appeared in the Courts below as *Amicus Curiae* in support of Respondents' position that the procedural doctrine of *forum non conveniens* continues to be available in an action governed by the Montreal Convention.

A. Relevant Facts

On March 25, 2005, Newvac entered into a charter contract with WCA in Colombia pursuant to which WCA was to provide a 152-passenger MD-82 aircraft and crew for round-trip flights from Martinique to Panama during May-August 2005. After entering into the charter contract with WCA, Newvac contracted with Globe Trotter, a Martinique travel agency, whereby it agreed to provide the WCA aircraft to Globe Trotter for a series of excursions between Martinique and Panama. These excursion packages were then sold by Globe Trotter to individual passengers in Martinique. Thus, contrary to the statements of Petitioners, Newvac was not a "clandestine airline" or the "*de facto* operator" of WCA. *See* Petition at 3-4. Newvac simply was a small tour operator and could not and did not provide any pilot training or

aircraft parts, airlines control fees, or assert any control over the WCA's flight operations or personnel.

The accident occurred on August 16, 2005, when the WCA aircraft crashed during a return trip from Panama following one of these excursions.

B. Relevant Proceedings in the Courts Below

While there was no dispute that the District Court had personal and subject matter jurisdiction over Newvac, WCA contested personal jurisdiction and Newvac contested the convenience of the Southern District forum.[2]

The District Court Decisions. Eventually, only WCA and the Newvac remained in the litigation. The accident, however, had little connection to the United States.[3] Although WCA was the

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[2] WCA filed a motion to dismiss for lack of personal jurisdiction which was held in abeyance pending disposition of the *forum non conveniens* motion. In addressing the Bapte Plaintiffs' Fed. R. Civ. P. 60(b) motion filed while this case was pending on appeal (*see* discussion *infra* at 7), the District Court noted that "[i]n contrast to the French court, this Court does not have personal jurisdiction over West Caribbean. . . ." *In re West Caribbean Airways, S.A.*, No. 06-22748, Slip Op. at 2 (S.D. Fla. Sept. 11, 2009) (reproduced Opp. App. at 5a-11a), *aff'd as amended sub nom. Bapte v. West Caribbean Airways*, 2010 WL 1141063 (11th Cir., Mar. 25, 2010) (reproduced Opp. App. at 1a-4a).

[3] All damage evidence and almost all relevant liability evidence was located outside the United States: (1) the damage evidence for the 152 passenger-decedents and approximately 665 beneficiaries is located in Martinique; (2) the accident occurred in Venezuela while en route from Panama to Martinique; (3) WCA is a Colombian certificated air carrier; (4) the flight crew of WCA Flight 708 were licensed in

only insured carrier able to satisfy any judgments resulting from this loss, Newvac was the only entity ("contracting carrier") capable of being sued in the United States. Based on this tenuous connection with the United States, and coupled with the facts that all the passenger-decedents were residents of Martinique, WCA had consented to jurisdiction in Martinique and WCA was (and currently is) in the process of defending and/or settling cases brought by certain plaintiffs in Martinique, Newvac moved for dismissal on grounds of *forum non conveniens*. WCA filed a Notice of Joiner in Newvac's motion.

The District Court by Preliminary Order dated September 27, 2007, found that Newvac was a "contracting carrier" within the meaning of Article 39 of the Montreal Convention, and therefore, it had treaty subject-matter jurisdiction pursuant to Article 33.[4] *WCA I*, 619 F. Supp. 2d at 1305-08 (Pet. App. at App. 32-38). Next, the District Court addressed whether the Montreal Convention precluded the application of the procedural doctrine of *forum non conveniens* when a court has juris-

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Colombia; (5) the WCA aircraft was based, maintained and registered in Colombia; (6) the Venezuelan authorities investigated the accident with the assistance of the French authorities; and (7) Martinique/French substantive law likely would apply.

[4] Article 46 of the Montreal Convention provides that any action for damages against the actual or contracting carrier "must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business." Article 33 in turn sets forth 5 fora where the action must be brought.

diction pursuant to the Convention. The court found that this issue was answered by the unambiguous language of Article 33(4), which provides that "[q]uestions of procedure shall be governed by the law of the court seised of the case." *Id.* at 1310-11 (Pet. App. at App. 42-45). The District Court explained that because the *forum non conveniens* doctrine is part of United States civil procedure, the Convention unambiguously permits its application in accordance with the law of the forum. *Id.* The District Court found that this conclusion also was consistent with the Convention's drafting history and post-ratification understanding of the contracting states. *Id.* at 1311-28 (Pet. App. at App. 46-86).

In a second order dated November 9, 2007, the District Court addressed the merits of the *forum non conveniens* motion. *WCA II*, Pet. App. at App. 88-108. Newvac and WCA agreed not to contest liability as a condition for *forum non conveniens* dismissal. While Plaintiffs agreed that with respect to the Montreal Convention claims defendants' liability will not be at issue, they argued that actions should not be dismissed given defendants' likely assertion of third-party claims for contribution against, *inter alia*, U.S.-based manufacturers.[5] *WCA II*, Pet. App. at App. 99-100. Thus, the principle focus of the *forum non conveniens* inquiry was damages and the impact of defendants' potential third-party liability claims.

After considering the adequacy of the alternative forum (Martinique) and the deference owed to

[5] While Plaintiffs brought products liability actions against the aircraft manufacturers in Martinique, they did not bring similar actions in the United States.

the Plaintiffs' choice of forum, the District Court balanced each of the public and private interest factors and granted the *forum non conveniens* motion, finding that Martinique was the more convenient forum for resolution of the claims. *WCA II*, Pet. App. at App. 107-08. Plaintiffs appealed both rulings of the District Court.

Petitioners' Rule 60(B) Motion. In May 2009, while the appeal of the *forum non conveniens* dismissal was pending, the District Court denied a motion to dismiss the separate crew action against Newvac and numerous U.S.-based manufacturers on *forum non conveniens* grounds. *See In re West Caribbean Crew Members*, 632 F. Supp. 2d 1193 (S.D. Fla. May 14, 2009). The motion was denied "mainly because the Court was not persuaded that a French (European Union) Court would have jurisdiction over the claims of the estates of the deceased Colombian crew members against U.S. corporations for an accident in Venezuela." *In re West Caribbean Airways, S.A.*, No. 06-22748, Slip Op. at 3, n. 4 (S.D. Fla. Sept. 11, 2009) (Opp. App. at 8a, n. 4). Viewing that the denial of the motion to dismiss the crew cases changed the circumstances surrounding the prior dismissal of the passenger cases, Petitioners herein (the *Bapte* Plaintiffs) filed a motion for relief from judgment with the District Court pursuant to Fed. R. Civ. P. 60(b). The District Court held that due to the pendency of the appeal, it lacked jurisdiction to rule on the Rule 60(b) motion but addressed the merits of the motion "to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion." Opp. App. at 6a. The Court noted that its order denying the motion to dismiss the crew cases on

forum non conveniens grounds did not mean that the continued application of its order dismissing the passenger cases was no longer equitable. *Id* at 10a. The District Court explained:

> The Motion is based on no just or equitable reason which warrants relief. Rather, the Motion is merely part of strategy to subvert the FNC Order, indirectly influence the Eleventh Circuit Court of Appeals, and return to this Court at all costs, including the lost opportunity for speedier and more complete justice in the French court. [footnote omitted] While the Court of Appeals might ultimately view the FNC Order differently, this Court's view is that subsequent events have confirmed that the French court is the superior forum for the resolution of the passengers' Montreal Convention claims, such as were raised by the "Bapte" Plaintiffs. The French court is poised to make collectible damage awards for the passengers' wrongful deaths pursuant to French law. West Carribean [sic] has conceded liability in the French court and waived the damages caps under the Montreal Convention; moreover, its insurer has agreed to pay the passengers' estates the full amount of the awards. [footnote omitted] In contrast to the French court, this Court does not have personal jurisdiction over West Carribean [sic]—the only defendant to the Montreal Convention claims with adequate assets and insurance coverage. And, liability for any additional product liability claims, even if

> permitted, is purely speculative and surely distant in resolution.

Opp. App. at 6a-7a.[6]

Petitioners' appealed. In a decision issued on March 25, 2010, the Court of Appeals affirmed the District Court's conclusion. *Bapte v. West Caribbean Airways,* 2010 WL 1141063 (11th Cir. Mar. 25, 2010) (Opp. App. at 1a-4a). While the Court of Appeals concluded that the District Court erred in holding it lacked jurisdiction to consider the motion, the Court found the error to be harmless "because the motion does not assert adequate grounds for relief from judgment. . . ." Opp App. at 3a.

The Court of Appeals Forum Non Conveniens Decision. On appeal, the *Bapte* and *Galbert* Plaintiffs argued that the *forum non conveniens* doctrine does not apply because the Montreal Convention precludes application of the doctrine as a matter of international law, and alternatively, even if the Convention permits application of the doctrine, the District Court

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[6] During the pendency of the passenger *forum non conveniens* appeal, the *Bapte* Plaintiffs also sued Newvac and WCA in Martinique pursuant to the Montreal Convention. Although the plaintiffs made marginal attempts to comply with the District Court's order to re-file their actions in Martinique within six months of dismissal, they did so with the sole intent to persuade the French courts to reject their claims. Opp. App. at 8a, n. 4. On August 24, 2009, the French court in Martinique issued an order rejecting the plaintiffs' claim that the French court lacked jurisdiction to entertain their claims and directed plaintiffs to submit proof of their damage claims to the court by October 23, 2009.

abused its discretion in applying it here. The Court of Appeals affirmed the decisions of the District Court finding no error or abuse of discretion. With respect to the availability of *forum non conveniens* in an action governed by the Montreal Convention, the Court of Appeals stated:

> We . . . find no ambiguity or limitation in the express language of Article 33(4), which states in no uncertain terms that questions of procedure—which can only reasonably be read to include *all* questions of procedure—are governed by the rules of the forum state. As the district court correctly noted, the doctrine of forum non convenience is "firmly entrenched in the procedural law of the United States." In addition, we are satisfied that a district court may—where appropriate—exercise its discretion to apply forum non conveniens, without interfering with the implementation of the Convention, so long as another Convention jurisdiction is available and can more conveniently adjudicate the claim.

Pierre-Louis, 584 F.3d at 1058 (footnotes omitted and emphasis in original) (Pet. App. at App. 12-13).

The Court of Appeals also found that the District Court did not abuse its discretion in balancing the private and public interest factors and dismissing the claims on *forum non conveniens* grounds. *Id.* at 1059-62 (Pet. App. at App. 13-20). After the denial of rehearing, the *Bapte* Plaintiffs filed this Petition.

REASONS FOR DENYING THE WRIT

Petitioners present two questions for review based on an alleged conflict between the decision of the Court of Appeals below with (1) a decision of the Court of Appeals for the Ninth Circuit addressing *forum non conveniens* under the 1929 Warsaw Convention,[7] and (2) the decisions of this Court addressing the authority of a court to decide the issue of personal jurisdiction and *forum non conveniens* before its decides subject matter jurisdiction. These alleged conflicts are based upon an erroneous interpretation of the Montreal Convention and a misapprehension of the decisions cited by Petitioners. The decisions of the District Court and Court of Appeals are correct and do not conflict with any decision of this Court or any Court of Appeals. The Petition should be denied.

I

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE MONTREAL CONVENTION ALLOWS U.S. COURTS TO CONTINUE TO USE THE PROCEDURAL DOCTRINE OF *FORUM NON CONVENIENS*

The Montreal Convention issue presented to the Courts below was as a matter of first impression—whether the doctrine of *forum non conveniens*

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[7] Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* note following 49 U.S.C. § 40105.

continues to be available to a United States court in a case arising under the Montreal Convention.

Article 33 of the Montreal Convention sets forth five fora where an action for damages must be brought against the air carrier for passenger injury or death occurring during international carriage by air. Article 33(4), however, also clearly states that "[q]uestions of procedure shall be governed by the law of the court seised of the case."

Following well-settled rules of treaty interpretation,[8] the Courts below began with the words of the treaty in the context in which they are used and found that because there is no dispute that *forum non conveniens* is a "question[ ] of procedure" firmly entrenched in U.S. law, it clearly falls within the ambit of Article 33(4). *Pierre-Louis*, 584 F.3d at 1058 (Pet. App. at App. 11-12); *WCA I*, 619 F. Supp. 2d at 1305, 1310 (Pet. App. at App. 43). Thus, the Courts below found that the Montreal Convention does not prohibit the application of the doctrine *forum non conveniens* by the courts in the United States.

Petitioners argue that this decision of the Court of Appeals conflicts with *Hosaka v. United Airlines*, 305 F. 3d 989 (9th Cir. 2002), *cert. denied*,

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[8] As noted in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534-35 (1991) (internal citations and quotation marks omitted): "When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used. Other general rules of construction may be brought to bear on difficult or ambiguous passages. Moreover, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *See also El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999).

537 U.S. 1227 (2003), which they incorrectly characterize as the "only United States Appellate Decision to have interpreted the almost identical language contained" in Article 28(2) of the 1929 Warsaw Convention.[9] Petition at 6-8. Disagreeing with the Fifth Circuit, *Hosaka* held that "Article 28(1) of the Warsaw Convention overrides the discretionary power of the federal courts to dismiss an action for *forum non conveniens*." *Hosaka*, 305 F.3d at 993. *Hosaka* found the text of Article 28(2) to be ambiguous and then turned to the treaty's purposes, its drafting history, as well as evidence of the parties' post-ratification understanding to support its conclusion. Central to the *Hosaka*'s court conclusion was its finding that because in 1929 the *forum non conveniens* doctrine was relatively unknown and did not exist as it does today, it would be improper to incorporate it into the Convention. *Id.* at 994-1003. When the Montreal Convention was drafted in 1999, however, the opposite was true—the doctrine had become a "valuable procedural tool" in the United States.

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[9] Prior to *Hosaka*, the Court of Appeals for the Fifth Circuit and other district courts had uniformly applied *forum non conveniens* under the Warsaw Convention. *See In re Air Crash Disaster Near New Orleans, La., on July 9, 1982*, 821 F. 2d 1147, 1160-62 (5th Cir. 1987) (*en banc*), *vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *vacated in part and aff'd in part on remand* 883 F.2d 17 (5th Cir. 1989); *Chukwu v. Air France*, 218 F. Supp. 2d 979, 985-87 (N.D. Ill. 2002); *In re Air Crash Off Long Island, N.Y., on July 17, 1996*, 65 F. Supp. 2d 207, 212-14 (S.D.N.Y. 1999): *Lu v. Air China Int'l Corp.*, 1992 WL 453646, *1, n.1 (E.D.N.Y. 1992); *see also Brinkerhoff Maritime Corp. v. P.T. Airfast Servs. Indonesia*, [1992] 2 S.L.R. 776, Lexsee 2 SLR 776 (Sing. C.A.) (declining on *forum non conveniens* grounds to adjudicate a case governed by the Warsaw Convention).

Id. at 1003; *see also Pierre-Louis*, 584 F.3d at 1058 (Pet. App. at App. 11-12); *WCA I*, 619 F. Supp. 2d at 1305, 1310-11 (Pet. App. at App. 43-46).

Without regard to *Hosaka*'s rationale and dismissing as irrelevant the fact that *Hosaka* interpreted the 1929 Warsaw Convention, Petitioners argue that the Court below disregarded *Hosaka*. Petition at 8. The Court below did not disregard *Hosaka* but correctly found it to be distinguishable because "both cases[10] involved the interpretation of the Warsaw Convention, a predecessor to the Montreal Convention drafted in 1929, at which time *forum non conveniens*, in its current form, was not recognized under U.S. law." *Pierre-Louis*, 584 F.3d at 1058, n.7 (Pet. App. at App. 12). Indeed, *Hosaka* expressly recognized it was not addressing the applicability of *forum non conveniens* under the Montreal Convention. *Hosaka*, 305 F.3d at 999-1001 & n.17.

Petitioners nevertheless argue that the Court below improperly considered these critical legal differences and should have ignored the clear language of Article 33(4) of the Montreal Convention and blindly followed *Hosaka* because drafters of the Montreal Convention retained "the language and substance of the Warsaw Convention in order to preserve the large body of judicial precedents" such as *Hosaka*. Petition at 9-10 (*citing* S. Exec. Rep. 108-08 at 3 (2003)). Assuming *Hosaka* was correctly decided, Petitioners overlook that when

[10] The Court also was distinguishing *Milor v. British Airways, Plc.*, [1996] Q.B. 702 (Eng. C.A.), a decision by the English Court of Appeals addressing *forum non conveniens* under the 1929 Warsaw Convention. Even *Hosaka* did not fully adopt the *Milor* rationale. *Hosaka*, 305 F.3d at 995-96.

the Montreal Convention was drafted in 1999, *Hosaka* had not even been decided and *forum non conveniens* was firmly entrenched in U.S. procedural law and often applied to Warsaw Convention cases. *See supra* note 9. In fact, there is no evidence in S. Exec. Rep. 108-08 or the accompanying statements cited by Petitioners (Petition at 9-11) that the United States relinquished *forum non conveniens* in the negotiations for the Montreal Convention. *See WCA I*, 616 F. Supp. 2d at 1327 (Pet. App. at App. 85-86); *cf. Greene v. Beard*, 523 U.S. 371, 375 (1998) ("it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State").

Unlike the drafting of the Warsaw Convention, the United States was an active participant in the drafting of the Montreal Convention and the issue of *forum non conveniens* was extensively discussed by the drafters. It was not "voted down" as Petitioners claim. Petition at 10. As the Courts below found, the "history of the Convention is clear that it was the shared intent of the states party that each state could continue to apply its procedural rules, including *forum non conveniens*." *Pierre-Louis*, 584 F. 3d at 1058 n. 8 (Pet App. at App. 13). The District Court summarized the Montreal Convention drafting history as follows:

> What the . . . drafting history shows is that no State advanced a proposal which if adopted would have precluded the application of *forum non conveniens* to Montreal Convention cases in the courts of States adhering to the doctrine. Instead,

> it shows that the doctrine was extensively discussed, mainly with respect to the creation of the fifth jurisdiction, that proposals addressing the doctrine were advanced, including proposals which would have made *forum non conveniens* applicable only to the fifth jurisdiction or clarified its applicability to all jurisdictions, and that the United States actively and persistently opposed the inclusion of any *forum non conveniens* language except to clarify its general applicability, all while making it abundantly clear that United States courts would continue to employ the doctrine in Montreal Convention and other international cases. In the end, the consensus among the delegates was to omit any language respecting the applicability of *forum non conveniens* to avoid imposing the doctrine on States that do not employ it and distorting its application in States where it is commonly employed. In other words, the delegates determined to maintain the status quo: signatory countries employing the doctrine would continue to do so pursuant to subsection [4]: "Questions of procedure shall be governed by the law of the court seised of the case," and signatory countries that do not employ the doctrine would not be required to adjust their legal systems to accommodate the doctrine in cases arising under the Convention.

WCA I, 619 F. Supp. 2d at 1326 (Pet. App. at App. 81-82). Petitioners do not dispute the accuracy of

this drafting history; they simply ignore it, as they ignore the plain language of Article 33(4).

If the Court of Appeals followed *Hosaka*, it not only would have failed to give effect to the clear language of Article 33(4)[11] and the Convention's drafting history, but the views expressed by the United States on this issue. While Petitioners agree that "[r]espect is ordinarily due to the reasonable views of the Executive Branch concerning the meaning of an international treaty" (Petition at 10)[12], they fail to advise the Court that the United States filed Amicus Briefs in the Courts below supporting the position of Respondents with respect to the continued availability of *forum non conveniens* under the Montreal Convention. This position was summarized concisely in the United States Amicus Brief filed in the Court of Appeals:

> The Montreal Convention does not prohibit a U.S. court from applying *forum*

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[11] As noted by the District Court: "It also avoids the need to graft language onto subsection [4] so that it would read: 'Questions of procedure, other than *forum non conveniens*, shall be governed by the law of the court seised of the case'—a result the law plainly does not permit." *WCA I*, 619 F. Supp. 2d at 1311 (Pet. App. at App. 44-45). *See Chan v. Korean Air Lines*, 490 U.S. 122, 134-35 (1989) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation or power, and not an exercise of judicial functions.") (*quoting The Amiable Isabella*, 19 U.S. 1, 71 (1821)).

[12] *See Tseng*, 525 U.S. at 168 ("[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight") (*quoting Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 184-85 (1982)).

non conveniens in a case governed by the Convention. The text of the treaty provides that the respective domestic laws of the Parties will govern questions of procedure. *See* Art. 33(4). Under U.S. law, *forum non conveniens* is a procedural doctrine of general applicability. Application of *forum non conveniens* is also consistent with the general principle that a forum state's procedural rules apply under a treaty absent an express statement to the contrary.

It is unnecessary to look beyond the plain language of Article 33(4), but even if that text were ambiguous, the Montreal Convention's drafting history would support application of *forum non conveniens*. Prior to the drafting of the Montreal Convention, U.S. courts had uniformly applied the doctrine of *forum non conveniens* under the Warsaw Convention, and the delegates of the Montreal Convention envisioned that the doctrine would continue to apply in countries in which it had previously been recognized, including the United States. The historical record of the Montreal Convention's transmittal to and approval by the Senate similarly manifests the view of the President and the Senate that the Montreal Convention permitted the application of past precedent under the Warsaw Convention. Finally, significant weight is due to the Executive's view that the Montreal Convention permits application of *forum non conveniens*.

> The plaintiffs rely on *Hosaka* v. *United Airlines*, 305 F.3d 989 (9th Cir. 2002), and *Milor* v. *British-Airways, Plc.*, [1996] Q.B. 702 (Eng. C.A.), but those decisions—interpreting a different convention—do not overcome the plain language, negotiating history, U.S. ratification history, and Executive Branch construction of the Montreal Convention. *Hosaka* and *Milor* rely heavily on the unsettled nature of *forum non conveniens* in 1929, when the Warsaw Convention was drafted, and the lack of any evidence that the Warsaw Convention's drafters intended to incorporate the doctrine. In contrast, the Montreal Convention was drafted against a background of U.S. courts' application of *forum non conveniens* in Warsaw Convention cases and the statements of delegates that this practice would continue under the Montreal Convention. Finally, in *Hosaka*, the Executive had not provided its authoritative interpretation of the treaty. This Court should affirm the district court's holding that the Montreal Convention does not foreclose application of *forum non conveniens*.

Brief of the United States as Amicus Curiae In Support of Defendants-Appellees, No. 07-15828 at 7-8 (11th Cir. filed May 15, 2008). *See also WCA I*, 619 F. Supp 2d at 1328 (Pet. App. at App. 85-86).

Petitioners' arguments are presented without regard to the position of the United States and as if the Montreal Convention never existed. If this was a 1929 Warsaw Convention case, Newvac and

WCA would agree that a conflict exists between *Hosaka* and the decision of the Court of Appeals below. However, this case is governed by the Montreal Convention—a separate treaty with its own distinct drafting history and expectations of the contracting States.

The Court of Appeals properly decided to conduct a full analysis of the issue under the 1999 Montreal Convention rather than follow *Hosaka* which interpreted another treaty from another time. There is no conflict and the Petition should be denied.

II

THE COURT OF APPEALS DECISION FINDING THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING *FORUM NON CONVENIENS* DISMISSAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

The second question presented for review is equally without merit. Petitioners claim that the decision of the Court of Appeals below conflicts with *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007) and *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

Petitioners attempt to manufacture a conflict with *Sinochem* and *Ruhrgas* by arguing that the District Court's consideration of Newvac's and WCA's conditional liability concession was a resolution of the liability on the merits and any *forum non conveniens* analysis as to damages thereafter was "too late" and contrary *Sinochem*

and *Ruhrgas*. Petition at 11-13.[13] This argument, not presented to the Courts below, demonstrates a fundamental misapprehension of *Sinochem* and *Ruhrgas* and ignores the posture of the case below when the issue was addressed by the Courts below.

In *Ruhrgas*, the Court held that there is no mandatory sequencing of jurisdictional issues. *Ruhrgas*, 526 U.S. at 584. Thus, a court may dismiss a case for lack of personal jurisdiction without first establishing subject-matter jurisdiction. *Id.* at 578. In *Sinochem*, the Court held that it was not required to first definitively ascertain its own jurisdiction before dismissing a case under the *forum non conveniens* doctrine. *Sinochem*, 549 U.S. at 433-34. The basic premise underlying both *Sinochem* and *Ruhrgas* is that resolution of a court's jurisdiction is vital only if the court proposes to issue a judgment on the merits. Because *forum non conveniens* or personal jurisdiction are threshold non-merit issues which do not entail any assumption by the court of substantive "law-declaring powers," the resolution of these issues can precede a subject-matter inquiry. *Sinochem*, 549 U.S. at 433.

Unlike *Sinochem* and *Ruhrgas*, there was no dispute that the District Court below had jurisdiction over Newvac (personal and subject matter) and, therefore, was fully competent to resolve the case on a merit or non-merit (*forum non conve-*

[13] Contrary to what Petitioners imply (Petition at 4, 12), discovery was limited to the issues related to *forum non conveniens* and personal jurisdiction over WCA. *See* Joint Status Report, No. 06-22748, Doc. No. 155 at 4 (S.D. Fla. entered Aug. 31, 2007).

niens) basis. Although it was fully competent to do so, the District Court did not render a decision on the merits; it simply held that the merits need to be determined elsewhere.

Petitioners also ignore that "the parties agree[d] that with respect to the Montreal Convention claims, Defendants' liability will not be at issue" and that the principle contention will be the amount of damages. *WCA II*, Pet. App. at App. 99. Here, liability was irrelevant with respect to the Convention claims, not only because Newvac and WCA agreed not to contest liability, but also because, as Petitioners argued, Article 21 of the Convention creates a virtual strict liability regime and the only defense available to Newvac/WCA was to establish that they had "zero" percent liability which would be virtually impossible. Thus, Petitioners viewed the conditional concession of liability not as impermissible but as "meaningless" because "liability will not be an issue in *any* forum" and that "there will be no trial of their liability in *any* forum." Plaintiffs' Oppositions to [Newvac] Motion to Dismiss on Grounds of Forum Non Conveniens, No. 06-22748, Doc. No. 170 at 2, 10 (S.D. Fla. filed Oct. 19, 2007) (emphasis in original); *see* Joint Status Report, No. 06-22748, Doc. No. 155 at 4 (S.D. Fla. filed Aug. 31, 2007) ("*Plaintiffs' Position*: Should the Montreal Convention be found applicable to this matter, plaintiffs believe that their claims will likely require trials on damages only, since Article 21(2) of the Convention imposes on carriers strict liability up to approximately $150,000, and imposes on the carrier the burden of proving it is entirely without fault in order to escape liability. . . ."). In any event, the conditional concession of liability by Newvac and

WCA was an appropriate factor for the District Court to consider, especially in light of Petitioners' arguments and the procedural posture of the case.[14] Accordingly, the decision of the Court of Appeals in no way conflicts with *Sinochem* and *Ruhrgas*.

Petitioners' remaining arguments relating to Newvac's alleged waiver of venue and the alleged improper application of the *forum non conveniens* factors by the District Court (Petition at 13-14) similarly are without merit and do not present a reason to grant *certiorari*. Petitioners offer no legal basis for their newly presented venue waiver argument.

Even if there was some valid legal basis for this venue argument, Petitioners overlook that Newvac's and WCA's offer to concede liability was con-

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[14] *See Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1315 (11th Cir. 2001) (giving weight to defendants' concession of liability if case were tried in the country in which the airplane crashed); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 614-15 (3d Cir. 1991) (finding dismissal inappropriate where there had been extensive merits discovery and the balance of the private and public interest factors was close, but providing that the "district court may re-enter its order dismissing on forum non conveniens grounds if Du Pont, within 30 days of the remand, makes a further concession which eliminates liability as a relevant issue"); *Jennings v. Boeing Co.*, 660 F. Supp. 796, 805 (E.D. Pa. 1987) (liability concession would make trial a simple issue of appropriate damages and balance of convenience regarding first private interest factor weighs in favor of dismissal); *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493, 500 & n 7 (S.D.N.Y. 2007) (agreement not to contest liability is appropriate factor to consider but even without it dismissal appropriate).

ditional on *forum non conveniens* dismissal. Thus, there could be no waiver.

Finally, a review of the District Court decision clearly evidences that it considered each and every relevant private and pubic interest factor in its *forum non conveniens* analysis. *WCA II*, Pet. App. at App. 98-107. The District Court even considered Petitioners' arguments related to the possible assertion by the defendants of third-party liability claims against U.S.-based manufacturers and found that it did not alter the propriety of *forum non conveniens* dismissal. *WCA II*, Pet. App. at App. 95. The Court of Appeals reviewed the District Court's analysis and found no abuse of discretion. *See Pierre-Louis*, 584 F.3d at 1059-62 (Pet. App. at App. 13-20).

The Courts below committed no error and their decisions do not conflict with *Sinochem* or *Ruhrgas*.

CONCLUSION

The Petition fails to set forth any reason for review to be granted—there is no conflict with the drafters' intent or express language of the Montreal Convention; there is no conflict among the Circuits; and there is no conflict with the decisions of this Court. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: May 5, 2010

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15175
Non-Argument Calendar
Filed March 25, 2010

D.C. Docket No. 06-22748-CV-UU

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE,

Plaintiffs-Appellants,

—versus—

WEST CARIBBEAN AIRWAYS, a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before TJOFLAT, WILSON and COX,
Circuit Judges.

PER CURIAM:

In August 2005, while en route from Panama to Martinique, West Caribbean Airlines, S.A. Flight 708 crashed in Venezuela, killing all passengers and crew on board. Representatives of the passengers filed several lawsuits, which were consolidated in the United States District Court for the Southern District of Florida. They asserted wrongful death and strict liability claims against Defendants West Caribean Airlines, Newvac Corporation, Go 2 Galaxy, Inc., and Jacque Cimieter pursuant to 28 U.S.C. § 1369. In addition, representatives of the crew members brought products liability lawsuits against manufacturers of the airplane and negligence suits against Newvac in the same district court. The crew cases were consolidated with one another, but were not consolidated with the passenger cases.

In November 2007, the district court dismissed the passenger cases on *forum non conveniens* grounds, and the passengers' representatives appealed. We affirmed the district court's order dismissing the cases in *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). In May 2009, while the appeal of the dismissal was still pending, the district court denied a motion to dismiss the crew cases on *forum non conveniens* grounds. Believing that the denial of the motion to dismiss the crew cases changed the circumstances surrounding the prior dismissal of the passenger cases, the representatives of the passengers filed a motion for relief from judgment with the district court. *See* Fed. R. Civ. P. 60(b).

The district court issued an order on the Rule 60(b) motion while the appeal of its dismissal of the passenger cases was still pending. It held that due to the pendency of the appeal, it lacked jurisdiction to rule on the motion for relief from judgment. (R. 19-251 at 1.) Even so, the court addressed the merits of the motion and wrote "to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion." (*Id.*) The court explained that "[t]he Motion is based on no just or equitable reason which warrants relief" (*id.* at 2), and its order denying the motion to dismiss the crew cases on *forum non conveniens* grounds did not mean that the continued application of its order dismissing the passenger cases was no longer equitable. (*Id.* at 4.)

After review of the record, we conclude that the district court erred in holding it lacked jurisdiction to consider the motion. We have held that a district court retains jurisdiction to consider a Rule 60(b) motion for relief from judgment even after an appeal of the judgment from which relief is sought has been noticed. *See Parrott v. Wilson*, 707 F.2d 1262, 1266-67 n.8 (11th Cir. 1983) (citing *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976); *Ferell v. Trailmobile, Inc.*, 223 F.2d 697, 698-99 (5th Cir. 1955)). Nevertheless, because the motion does not assert adequate grounds for relief from judgment, we conclude that the erroneous jurisdictional ruling was harmless, and we affirm the denial of relief.

The passengers' representatives argue that the denial of the motion to dismiss the crew cases created an automatic right, under 28 U.S.C. § 1369,

for the passengers to intervene in the crew cases. They argue that the denial established the Southern District of Florida as the appropriate forum for resolving any claim arising out of the crash of Flight 708 and constituted changed circumstances justifying relief under Rule 60(b)(5) and/or (6). We agree, however, with the district court's well-reasoned analysis on page four of its order explaining that 28 U.S.C. § 1369 merely provides the court with jurisdiction over all claims arising out of the disaster and that it exercised that jurisdiction when it applied the doctrine of *forum non conveniens* to dismiss the passenger cases. (R. 19-251 at 4.) We agree that its denial of a motion to dismiss the crew cases on *forum non conveniens* grounds did not make continued application of its dismissal of the passenger cases inequitable. (*Id.*)

The district court had jurisdiction to consider the Rule 60(b) motion, but the motion did not assert appropriate grounds for relief from judgment. Therefore, we vacate denial of the motion for want of jurisdiction, and amend the order to deny the motion on the merits. We affirm the order as amended.

ORDER AMENDED AND AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals
Eleventh Circuit

By : /s/ [Illegible]
Deputy Clerk
Atlanta, Georgia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-22748-CIV-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, *et al.*

ORDER ON MOTION FOR RULE 60(B) RELIEF

THIS CAUSE is before the Court on the "Bapte" Plaintiffs' Motion For Rule 60(b) Relief and Incorporated Memorandum of Law in Support (the "Motion") (D.E. 247) and Request for Oral Argument (D.E. 248), both filed on August 28, 2009.

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. The Motion seeks relief from this Court's Order Granting Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*, entered on November 18, 2007 (the "FNC Order"). (D.E. 184.) In the FNC Order, the Court dismissed the actions of the passengers, including those of the "Bapte" Plaintiffs, against Defendants West Caribbean Airlines, S.A. ("West Caribbean"), Newvac Corporation ("Newvac"), and

Go 2 Galaxy, Inc. ("Go 2") under the Montreal Convention and directed the passengers to pursue their remedies in the French court in Martinique.[1]

The FNC Order to which the Motion is directed is on appeal and oral argument is scheduled for September 23, 2009. Due to the pendency of the appeal, this Court lacks jurisdiction to rule on the instant motion. Nonetheless, the Court writes to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion.

The Motion is based on no just or equitable reason which warrants relief. Rather, the Motion is merely part of strategy to subvert the FNC Order, indirectly influence the Eleventh Circuit Court of Appeals, and return to this Court at all costs, including the lost opportunity for speedier and more complete justice in the French court.[2] While

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[1] This case arises of the August 16, 2005 crash of an airplane operated by West Caribbean, a Columbian airline. The crash occurred in Venezuela. Newvac chartered the aircraft for Go 2, a Martinican travel agency, for a series of round-trip flights between Martinique and Panama. The deceased passengers were mainly French citizens and residents of Martinique—none were United States domiciliaries.

[2] This strategy consists of three parts: first, petitioning the French court in Martinique to decline jurisdiction over the passengers' Montreal Convention claims (which effort was rejected by the French court on August 24, 2009); second the filing of a motion to intervene in the product-liability actions brought in this District by the representatives of the estates of the deceased crew members, notwithstanding that the "Bapte" Plaintiffs represented in their opposition to the motion to dismiss the passengers' cases on the grounds of *forum non conveniens* that resulted in the FNC Order that they would not pursue such claims; and

the Court of Appeals might ultimately view the FNC Order differently, this Court's view is that subsequent events have confirmed that the French court is the superior forum for the resolution of the passengers' Montreal Convention claims, such as were raised by the "Bapte" Plaintiffs. The French court is poised to make collectible damage awards for the passengers' wrongful deaths pursuant to French law. West Caribbean has conceded liability in the French court and waived the damages caps under the Montreal Convention; moreover, its insurer has agreed to pay the passengers' estates the full amount of the awards.[3] In contrast to the French court, this Court does not have personal jurisdiction over West Caribbean—the only defendant to the Montreal Convention claims with adequate assets and insurance coverage. And, liability for any additional product-liability claims, even if permitted, is purely speculative and surely distant in resolution.

In the Motion, the "Bapte" Plaintiffs argue that the Court's May 14, 2009 Order Denying the Defendants' Motions to Dismiss on the Grounds of *Forum Non Conveniens* in the companion, consolidated "Crew Member Case" (Case No. 07-22015-Civ-Ungaro, D.E. 321) now makes it apparent that there will be duplicate litigation arising out of the

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third, this Motion which argues that circumstances somehow have changed since entry of the FNC Order favoring litigation in this District by reason of the pendency of the product-liability claims of the representatives of the deceased crew members, despite the fact that such cases have been pending since August 2007.

[3] West Caribbean has approximately 450 million euros in coverage for the claims arising from the accident.

crash in both this Court and the French court in Martinique which could yield inconsistent results.[4] However, the passengers' Montreal Convention claims in the French court and the product-liability Crew Member Case in this Court are materially distinct and pose no danger of inconsistent results. With respect to liability; in Montreal Convention cases, the airline's fault is presumed; while in the product-liability cases, complicated issues of product defect and causation on the part of the aircraft's manufacturers, lessors, lessees, and owners must be resolved. In

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[4] Actually, this Court, in the Crew Member Case, denied a *forum non conveniens* motion seeking a transfer to the French court on September 30, 2008, nearly a year ago; the motion was denied mainly because the Court was not persuaded that a French (European Union) court would have jurisdiction over the claims of the estates of the deceased Colombian crew members against U.S. corporations for an accident in Venezuela. The May 14, 2009 order in the Crew Member Case denied a *forum non conveniens* motions seeking a transfer to Columbia.

What really prompted the filing of this Rule 60(b) motion is that after this Court issued the FNC Order, the "Bapte" Plaintiffs sought to persuade the French court to decline to exercise jurisdiction over their Montreal Convention claims. The Court infers that the purpose of this exercise was to be able to argue to the Court of Appeals that the French court was not an alternative available forum for the Montreal Convention claims and that therefore the FNC Order should be reversed. This effort, however, came to a conclusion on August 24, 2009 when the French court ruled that it had jurisdiction and ordered the "Bapte" Plaintiffs to submit proof of their damages by October 23, 2009. This Rule 60(b) Motion followed four days later. The failed attempt in Martinique to frustrate this Court's duly entered order hardly qualifies as a just or equitable reason for relief under Rule 60(b).

fact, in the Montreal Convention cases pending in the French court, West Caribbean, over which this Court cannot assert jurisdiction, has appeared and both conceded liability and waived the damage caps. And under any theory of liability, the passengers' estates will be entitled to but one recovery for wrongful death and those damages will have to be assessed in accordance with the law of the place with the most significant relationship to the issue of damages. *See, e.g., Harris v. Berkowitz,* 433 So. 2d 613 (Fla. 3d DCA 1983). In the case of the "Bapte" Plaintiffs, for example, that assessment likely will be made under the law of their domicile regardless of forum location.[5] *See id.*

The "Bapte" Plaintiffs also argue that somehow the Court's May 13, 2009 order denying the motion to dismiss *on forum non conveniens* grounds in the Crew Member Case, triggered the application of 28 U.S.C. § 1369 by establishing the Southern District of Florida as the single forum for resolution of all claims arising out of the West Caribbean crash. However, the statute simply provides for this Court to have original jurisdiction over all claims arising from the disaster, and this Court has been exercising that jurisdiction since 2006. It was in the exercise of that jurisdiction that the Court determined that the doctrine of *forum non conveniens* warranted re-filing of the

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[5] The undersigned concedes that, depending on the forum, the damages awards might or might not be made by a jury. But speculation that a jury award might be greater than a non-jury award is not a just or equitable reason warranting Rule 60(b) relief from the FNC Order.

wrongful death claims arising under the Montreal Convention in the French court in Martinique.[6]

Finally, the Court notes that, although not argued as a ground for Rule 60(b) relief, the "Bapte" Plaintiffs have moved to intervene in the consolidated Crew Member Case and therefore may contend that they should not be required to litigate in two fora. However, it is obvious that litigation in Martinique on the Montreal Convention claims will best serve the "Bapte" Plaintiffs' interests. Unlike in the Crew Member Case where liability is contested and not likely to be resolved for some time, the "Bapte" Plaintiffs and the estates of the other passengers will be able to obtain a prompt and possibly full recovery in the French court.

In sum, the "Bapte" Plaintiffs have failed to demonstrate that continued application of the FNC Order is no longer equitable or that any other of the reasons they cite justifies relief. In fact, the French court in Martinique clearly can provide speedier and more complete justice than possibly can be provided in this forum. Therefore, the FNC Order was and remains entirely in the "Bapte" Plaintiffs' interests and legally correct.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion For Rule 60(b) Relief and Incorporated Memorandum

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[6] That a federal court may have jurisdiction over an action does not moot the doctrine of *forum non conveniens*. In fact, only in limited circumstances may a court apply the doctrine before jurisdiction is established. *See Sinochem Intern. Co. Ltd. v. Malaysia Inter. Shipping Corp.*, 549 U.S. 422, 432 (2007).

of Law in Support (D.E. 247) is DENIED FOR LACK OF JURISDICTION. It is further

ORDERED AND ADJUDGED that the Request for Oral Argument (D.E. 248) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of September, 2009.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

CONVENTION

FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR DONE AT MONTREAL ON 28 MAY 1999

THE STATES PARTIES TO THIS CONVENTION

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate

means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

Chapter I

General Provisions

Article 1—Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has

been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2—Carriage Performed by State and Carriage of Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items, the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3—Passengers and Baggage

1. In respect of carriage of passengers, an individual or collective document of carriage shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4—Cargo

1. In respect of the carriage of cargo, an air waybill shall be delivered.

2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5—Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

(c) an indication of the weight of the consignment.

Article 6—Document Relating to the Nature of the Cargo

The consignor may be required, if necessary to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.

Article 7—Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 8—Documentation for Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 9—Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 10—Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other

person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 11—Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 12—Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 13—Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 14—Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 15—Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties

whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

Article 16—Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 17—Death and Injury of Passengers—Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or

in the course of any of the operations of embarking or disembarking.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 18—Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 19—Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 20—Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

Article 21—Compensation in Case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 22—Limits of Liability in Relation to Delay, Baggage and Cargo

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that

case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the

carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 23—Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary

Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1 500 000 monetary units per passenger in judicial proceedings in their territories; 62 500 monetary units per passenger with respect to paragraph 1 of Article 22; 15 000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogramme with respect to paragraph 3 of Article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of

paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

Article 24—Review of Limits

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liabil-

ity. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25—Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26—Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and

void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 27—Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

Article 28—Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

Article 29—Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the

right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 30—Servants, Agents—Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 31—Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved

by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 32—Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 33—Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the purposes of paragraph 2,

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seised of the case.

Article 34—Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability

of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 35—Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the court seised of the case.

Article 36—Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to

the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 37—Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Chapter IV

Combined Carriage

Article 38—Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Chapter V

Carriage by Air Performed by a Person other than the Contracting Carrier

Article 39—Contracting Carrier— Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual car-

rier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 40—Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

Article 41—Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any spe-

cial agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

Article 42—Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only be effective if addressed to the contracting carrier.

Article 43—Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 44—Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 45—Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

Article 46—Additional Jurisdiction

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.

Article 47—Invalidity of Contractual Provisions

Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

Article 48—Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

Chapter VI

Other Provisions

Article 49—Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 50—Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

Article 51—Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 5, 7 and 8 relating to the documentation of carriage shall not apply in to case of carriage performed in extraordinary circumstances outside the normal scope of a carrier business.

Article 52—Definition of Days

The expression "days" when used in this Convention means calendar days, not working days.

Chapter VII

Final Clauses

Article 53—Signature, Ratification and Entry into Force

1. This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28

May 1999, the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.

2. This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a "State Party" or "States Parties" in this Convention, otherwise than in paragraph 2 of Article 1, paragraph 1(b) of Article 3, paragraph (b) of Article 5, Articles 23, 33, 46 and paragraph (b) of Article 57, applies equally to a Regional Economic Integration Organisation. For the purpose of Article 24, the references to "a majority of the States Parties" and "one-third of the States Parties" shall not apply to a Regional Economic Integration Organisation.

3. This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.

4. Any State or Regional Economic Integration Organisation which does not sign this Convention may accept, approve or accede to it at any time.

5. Instruments of ratification, acceptance, approval or accession shall be deposited with the

International Civil Aviation Organization, which is hereby designated the Depositary.

6. This Convention shall enter into force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.

7. For other States and for other Regional Economic Integration Organisations, this Convention shall take effect sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession.

8. The Depositary shall promptly notify all signatories and States Parties of:

(a) each signature of this Convention and date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;

(c) the date of entry into force of this Convention;

(d) the date of the coming into force of any revision of the limits of liability established under this Convention;

(e) any denunciation under Article 54.

Article 54—Denunciation

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

Article 55—Relationship with other Warsaw Convention Instruments

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to

(a) the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

(b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);

(c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

(d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);

(e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

Article 56—States with more than one System of Law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has made such a declaration:

(a) references in Article 23 to "national currency" shall be construed as referring to the currency of the relevant territorial unit of that State; and

(b) the reference in Article 28 to "national law" shall be construed as referring to the law of the relevant territorial unit of that State.

Article 57—Reservations

No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:

(a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or

(b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montreal on the 28th day of May of the year one thousand nine hundred and ninety-nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to this Convention, as well as to all States Parties to the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols.